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failure of the company. It may also be true that no citizen is a part to such a contract, and has no contractual or other right to recover for the failure of the company to act; but, if the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites citizens, and if they avail themselves of its conveniences, and omit making other and personal arrangements for a supply of water, then the company owes a duty to them in the discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for the breach of contract, but for negligence in the discharge of such duty to the public, and is an action for a tort."

So it would seem that the controlling point in these two lines of holding is the existence or non-existence of a public duty on the part of the water company to the property owner. In *Fowler v. Water Works Co.*, quoted from above, the court denied the existence of such a duty, but intimates that if there were, the tort action would lie. In the *Fisher* case, the court answered that objection very simply by holding that the entering upon the performance of its contract with the city ipso facto imposed upon the water company a public calling and consequently a public duty. There seems no reason on principle why the entering upon the exercise of its franchises by a railroad company should impose upon it any more of a public duty than where a water company enters upon the performance of its charter, or contract with the city. The difference is one of degree, not principle. In a number of cases arising under a variety of states of fact and presented in various ways, the courts have declared that a water company, having entered upon the performance of a contract by it with the city, is engaged in a public business and its duty to furnish water pursuant to its charter or contract is a public one. *Crosby v. Montgomery*, 108 Ala. 498; *McCrary v. Beaudry*, 67 Cal. 120; *Crow v. San Joaquin etc. Canal Co.*, 130 Cal. 309; *Wagner v. Rock Island*, 146 Ill. 139; *Smith v. Lincoln*, 170 Mass. 488; *New York State Trust Co. v. Duluth*, 70 Minn. 257; *American Water Works Co. v. State*, 46 Neb. 194, 50 Am. St. Rep. 610; *Crumley v. Watauga Water Co.*, 99 Tenn. 424.

The conclusions reached in the *Fisher* cases, and the *Mugge* case cannot help but have a very strong influence upon future litigation along those lines; and since this tort theory so simply and effectively obviates the technical objection to suing ex contractu, it may not be going too far to predict that in the future cases, which in the nature of things are certain to arise involving those questions, many courts will follow them.

R. W. A.

EVIDENCE IN DEPORTATION PROCEEDINGS UNDER THE ACT OF CONGRESS OF MAY 5TH, 1892.—New light has been recently thrown upon the character and scope of the Act of Congress of May 5th, 1892, relating to Chinese laborers in the United States, without certificate of registration, by the case of *Moy Suey v. United States* (1906), C. C. A. 7th Cir., 147 Fed Rep. 697. The Act

has been criticised as being excessively harsh in its operation, and its constitutionality has been seriously questioned, in the case of *Fong Yue Ting v. United States*, 149 U. S. 698, in which case there was a divided court and strong dissenting opinions by the minority justices. But, granted that the Act is constitutional within its proper scope, as it must be under the decision of the Supreme Court above referred to, there still remain some very difficult questions relating to its scope and application. Section 6 of the Act provides in substance that Chinese laborers found in this country and arrested under the Act as such, shall be deported unless they produce the certificate prescribed or establish satisfactory reasons for not possessing it, and prove residence in the United States on May 5, 1892, by the testimony of one credible witness other than Chinese. Clearly these rules of evidence prescribed are radically opposed to the rules of evidence in criminal cases which have in the Anglo-Saxon system of jurisprudence, been evolved as best calculated to preserve the rights and liberties of the individual, and the best interests of society in general. The presumption of innocence, which is the basis of the criminal trial under the English system, is abolished. The Act is defended on the ground that the proceedings under it are civil in their nature, and hence it is competent for Congress to prescribe the rules of evidence which shall obtain, and it would seem that this is the only ground upon which the Act can be defended and be held to be constitutional.

The defendant in the principal case was arrested in Chicago, charged with being a Chinese laborer, unlawfully in the United States, without certificate of registration. He set up as a defence that he was a native born American citizen, and offered evidence in support of this contention. The court held that he was entitled to have the question of his citizenship judicially determined, in accordance with the ordinary and usual rules of evidence.

The decision in this case is in harmony with the doctrine contended for in the note on the case of *Low Foon Yin v. United States Immigration Commissioner*, 145 Fed. Rep. 791, in 5 MICHIGAN LAW REVIEW 129, where the position was taken that the Act of Congress of May 5, 1892, is not for all purposes civil in its nature so as to dispense in every case, with the ordinary rules of evidence. The court, in the principal case, seems not to have decided, in so many words, that the proceedings there were criminal in their nature, and therefore that the rules of criminal evidence must apply, since the question did not arise in precisely the same manner that it did in the *Low Foon Yin* case. But it seems that the question was necessarily involved and determined in the decision rendered. The two cases are substantially identical in their material facts. In both, the defendant was arrested within the United States and charged with being unlawfully therein, under the provision of the Deportation Act, casting upon *him* the burden of showing his right to remain, on pain of deportation. The point which is here sought to be made as applicable to both cases is this: before the provisions of the Act of Congress in question, prescribing the rules of evidence in deportation proceedings, can apply so as to cast upon the defendant the burden of showing by certificate or otherwise his right to remain, the burden is on the government to show

by affirmative proof that the defendant comes within the forbidden class covered by the Act. As to such preliminary investigation or examination, the proceedings are criminal in their nature and must be governed by the "ordinary rules" of criminal evidence. The mere arrest of a man on suspicion cannot cast upon him the burden of showing his innocence.

As stated in the note on the *Low Foon Yin* case, *supra*, the argument that the proceedings under the Act are entirely civil is this: it has been decided by the Supreme Court that aliens, and in this case Chinese aliens, have no inherent right to remain in the United States, though residing therein, *Fong Yue Ting v. United States*, *supra*. Therefore a proceeding to remove them can deprive them of no constitutional right to remain, for they possess none. Therefore, not being a proceeding for the forfeiture of any right or involving any punishment, it is a civil proceeding. To apply this argument to a case where it is not yet determined whether the defendant has or has not rights which may be forfeited, is to assume the very point in issue, and would seem entirely unwarranted. In the *Low Foon Yin* case, the defendant attempted to stand upon his constitutional right not to testify against himself in a criminal proceeding. He was, however, compelled so to testify, as to his birth, nationality and occupation, and this compulsion, before it was ascertained that the Act applied to him, was, it would seem, a violation of his right. In the principal case, the defendant did more than he could constitutionally have been compelled to do, namely, took the stand himself and introduced the evidence of his uncle and his cousin as to his status. The evidence so given, was held to be sufficient to establish the point in issue, the court saying, that "the ordinary rules of evidence" must control and not the rules of the Act.

The court does not specifically state whether or not the "ordinary rules of evidence," which it decides must apply, are to be those of civil or criminal actions, but there seems to be no escape from the conclusion that the latter was meant. If the possibility that the rules of *civil evidence* were meant, is considered, we are met by the proposition that in civil cases the Legislature or Congress has the power to prescribe the rules of evidence that shall govern, Cf. COOLEY, CONSTITUTIONAL LIMITATIONS, 7th Ed., p. 526, and that in this particular instance they have done so. By deciding that the rules of evidence prescribed by the Act do not apply, the court necessarily decided that the proceeding was criminal in its nature. To assert that it was civil, would be to negative the decision of the court that the Act could not govern; for, being civil, the Act must govern. In the opinion, the court uses language pointing strongly to the conclusion that it regarded the proceeding as criminal in its nature. It says, "Nativity gives citizenship and is a right under the Constitution. It is a right that Congress would be without constitutional power to curtail or give away. It is a right to be adjudicated in the courts in the usual and ordinary way of adjudicating constitutional rights. No rule of evidence may fritter it away * * * The citizen deported is banished, and banishment is a punishment that can follow only a judicial determination, in due process of law." The decision of the District Court was reversed and the appellant discharged.

T. H. S.